

CCASE:
MSHA V. WESTERN FUELS-UTAH

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

March 22, 1989
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket Nos. WEST 86-113-R
WEST 86-114-R
WEST 86-245(A)

WESTERN FUELS-UTAH, INC.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

The issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)("Mine Act" or "Act"), is whether supervisors who meet the training certification requirements for supervisory personnel under a state program approved by the Department of Labor's Mine Safety and Health Administration ("MSHA") must be given task training prior to performing work for which non-supervisory miners would be required to have task training. 1/ MSHA cited Western Fuels-

1/ Section 115(a) of the Mine Act, 30 U.S.C. § 825(a), provides a comprehensive scheme for miner training. In general, section 115(a) requires training for new miners, annual refresher training, and task training. With regard to task training, section 115(a) provides in relevant part:

(a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary.... Each training program approved by the Secretary shall provide as a minimum that--

(4) any miner who is reassigned to a new task in which he has had no previous work

~279

Utah, Inc. ("Western Fuels") for a violation of section 115(a) of the Mine Act, 30 U.S.C. § 825(a), and 30 C.F.R. § 48.7 for failing to task train one of its section foremen in the operation of a roof-bolting machine prior to his using that machine. In proceedings before Commission Administrative Law Judge Roy J. Maurer,

Western Fuels argued that the foreman was exempt from the task training requirements by virtue of 30 C.F.R. § 48.2(a)(1)(ii), which excludes from coverage by section 48.7 "[s]upervisory personnel subject to MSHA approved State certification requirements..." 2/ Judge Maurer concluded that task

experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task.

The Secretary of Labor's regulations implementing section 115(a) are set forth at 30 C.F.R. Part 48. With regard to task training for miners working in underground coal mines, section 48.7(a) in pertinent part states:

Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in this paragraph and paragraph (b) of this section has been completed....

2/ The provisions of Subpart A of 30 C.F.R. Part 48 (30 C.F.R. §§ 48.1-48.12) set forth the training requirements applicable to "miners working in underground mines." 30 C.F.R. § 48.1. Sections 48.2(a)(1) and 48.2(a)(1)(ii) state:

(a)(1) "Miner" means, for purposes of §§ 48.3 through 48.10 of this Subpart A [Training and Retraining of Underground Miners], any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods. This definition shall include the operator if the operator works underground on a continuing, even if irregular, basis. Short term, specialized contract workers, such as drillers and blasters, who are engaged in the extraction and production process and who have received training under § 48.6 (Training of newly employed experienced miners) of this Subpart A may, in lieu of subsequent training under that section for each new employment,

receive training under
~280

training of the foreman was required because the exemption contained in section 48.2(a)(1)(ii) applies only to a supervisor actually and primarily engaged in supervision and not to one engaged in the extraction and production process. 9 FMSHRC 1355 (August 1987)(ALJ). Because this conclusion cannot be squared with the plain, unambiguous language of section 48.2(a)(1)(ii), we reverse. On February 3, 1986, Carson Julius, a miner at Western Fuels' Deserado Mine, an underground coal mine located in Rangely, Colorado, was promoted to section foreman. The criteria applied by Western Fuels in selecting a section foreman required that the person have the ability to operate face equipment in order to properly direct the work force in its operation, have on-the-job experience in underground operation of a coal mine, have supervisory skills, and be certified by the State of Colorado as a mine foreman. 3/ Julius had been certified as a mine foreman by the State on May 15, 1980, and in Western Fuel's opinion met the other selection criteria.

On February 28, 1986, Julius was in charge of a production crew assigned to the East Mains working section of the mine. In that section, roof was being bolted under Julius' supervision. The machine being used to bolt the roof was a Lee Norse TD-43-5-4F roof bolting machine. 4/ That morning, Sky Havens was operating the right hand boom of the roof bolting machine and Austin Mullens was operating the left hand boom. Julius instructed Havens to go to lunch, and Julius took his place as the operator of the right hand boom while Mullens continued to operate the left hand boom. After Julius and Mullens had installed one row of bolts, Mullens, contrary to Julius' repeated instructions, walked under unsupported roof to raise an end of a metal roof mat that had fallen to the floor. 5/ Mullens was killed when a large piece of the mine roof fell and struck

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§ 48.11 (Hazard training) of this Subpart A.

This definition does not include:

* * *

(ii) Supervisory personnel subject to MSHA approved State certification requirements....

3/ The State of Colorado certification requirements for supervisory personnel are approved by MSHA.

4/ The Lee Norse machine is double boomed and is normally operated by two miners, one on each side of the machine, who simultaneously install the bolts. Julius had operated the Lee Norse machine briefly on prior occasions. Julius had also operated other roof bolting

machines in the past.

5/ Metal roof mats were part of the roof support system used at the mine.

~281

him. 6/

During a subsequent investigation of the accident, MSHA Investigator Theodore L. Caughman found that prior to the accident Julius had not received task training in the use of the roof bolting machine. 7/ Caughman issued an order of withdrawal pursuant to section 104(g)(1) of the Mine Act, 30 U.S.C. § 814(g)(1), requiring Julius' removal from the mine on the grounds that Julius had not received the requisite task training. Caughman subsequently modified the order to allege that Western Fuels' failure to task train Julius was a violation of section 115(a) of the Act. In addition, Caughman issued a citation to Western Fuels pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), alleging that Julius' lack of task training was a violation of 30 C.F.R. § 48.7. Caughman further found that Julius' lack of training was of such nature as to significantly and substantially contribute to a mine safety hazard although it did not contribute to the cause of the accident. Western Fuels abated the order and citation by providing Julius with training in the operation of the roof bolting machine.

In his decision, the judge concluded that Julius was required to be task trained prior to operating the roof bolting machine and that Western Fuels violated section 115(a) of the Act and section 48.7 by failing to train Julius. 9 FMSHRC at 1365. The judge noted that section 48.2(a)(1)(ii) "on its face purports to except supervisory personnel subject to MSHA approved State certification requirements from the definition of 'miner', and therefore from the task training requirements of [section] 48.7." 9 FMSHRC at 1361. The judge focused his decision upon the question of whether the exemption applied to Julius.

The judge described the Secretary's position with regard to the language of section 48.2(a)(1)(ii) as follows: "[The Secretary] maintains that a person is 'supervisory' only so long as he 'supervises.' Once that person diverts from supervising to running mining machinery, that person is no longer 'supervisory' but rather is a 'miner' regardless of his job title." 9 FMSHRC at 1361. The judge found that Julius, "while engaged in operating the roof bolting machine was primarily engaged in a nonsupervisory task in the extraction and production process although he nominally retained his role as a 'supervisor,' i.e., a section foreman, throughout the period of this incident." 9 FMSHRC at 1363-64.

6/ This accident also led to the issuance to Western Fuels of

another citation alleging that a violation of 30 C.F.R. § 75.200 occurred when Mullens proceeded under unsupported roof. This violation was at issue in another proceeding and was upheld by the Commission. *Western Fuels-Utah*, 10 FMSHRC 256 (March 1988), pet. for review filed, No. 88-1313 (D.C Cir. April 22, 1988).

7/ The training plan then in effect at the mine, required under section 115(a) of the Mine Act and approved by an MSHA district manager, does not require supervisors to take task training but does require task training for roof bolters.

~282

The judge noted that the Secretary's interpretation of the term "supervisory personnel" had previously been set forth in a series of MSHA documents and accepted her interpretation as reasonable. 9 FMSHRC at 1361-62, 1364. The judge further held that the Secretary's interpretation of the exception was in accord with the statutory objectives of the Act pertaining to training, was consistently applied by MSHA, and was noticed to the industry. 9 FMSHRC at 1364-65. The judge concluded that the exception "must be limited to those supervisors who are actually engaged primarily in supervision" and that since Julius was "primarily engaged in operating the roof bolting machine, not supervision," Julius was required to have been task trained on the machine before undertaking its operation. 9 FMSHRC at 1365. Accordingly, the judge determined that Western Fuels violated section 48.7 and section 115(a) of the Mine Act. *Id.* The judge also found that the violation was significant and substantial in nature, and accordingly he affirmed the order of withdrawal and citation and assessed Western Fuels a civil penalty of \$180 for the violation. 9 FMSHRC at 1366-1367.

On review, Western Fuels does not dispute that, prior to the accident, it had not provided Julius with task training in the operation of the Lee Norse roof bolting machine. Rather, Western Fuels argues that the language of section 48.2(a)(1)(ii) excludes "supervisory personnel" subject to MSHA approved State certification from the task training requirements of Part 48 and that Julius comes within this exception. Western Fuels asserts that the Secretary's interpretation of section 48.2(a)(1)(ii), adopted by the judge, is an unlawful attempt by the Secretary to amend the regulation outside the rulemaking requirements of the Mine Act. 8/

We agree with Western Fuels that the language of section 48.2(a)(1)(ii) means what it says, that supervisory personnel subject to MSHA approved State certification requirements are exempt from the 30 C.F.R. §§ 48.3 through 48.10 training and retraining requirements. The parties stipulated that at the time the violations were cited Julius was a mine foreman certified by the State of Colorado, which

program was MSHA approved. We hold that as such he was exempt from the task training requirements of section 48.7.

We find the relevant regulations to be clear and unambiguous in this regard. Sections 48.3 through 48.10 set forth the requirements for

8/ The Secretary's argument with respect to the validity of the withdrawal order, which cited section 115(a), and the citation, which cited section 48.7, is the same. The regulations in Part 48-Subpart A, including sections 48.2(a)(1)(ii) and 48.7, set forth the requirements for training and retraining of underground miners and were promulgated pursuant to section 115 of the Act. No issue is presented in this case concerning the general validity of a supervisory exception to the training regulations. The parties accept the exception as valid but differ as to the meaning of the language of section 48.2(a)(1)(ii). The judge's decision was based on his analysis of this language as well. Therefore, in deciding this case, we focus only upon the meaning of the exception.

~283

submitting and obtaining approval of programs for training and retraining miners working in underground mines, the requirements for the training of new miners, the training of newly employed experienced miners, the training of miners assigned to a task in which they have had no previous experience, the requirements for annual refresher training of miners, and the requirements for record keeping and compensation. Section 48.2 expansively defines a "miner" for purposes of sections 48.3 through 48.10 as:

any person working in an underground mine and who is engaged in the extraction and production process, or who is regularly exposed to mine hazards, or who is a maintenance or service worker employed by the operator or a maintenance or service worker contracted by the operator to work at the mine for frequent or extended periods ... includ[ing] the operator if the operator works underground on a continuing, even if irregular basis.

However, after defining the "miners" who are subject to the requirements of sections 48.3 through 48.10, section 48.2(a)(1)(ii) expressly states that among those who are not included in the definition of miner are "[s]upervisory personnel subject to MSHA approved State certification requirements." It is not in dispute that the State of Colorado certification requirements are approved by MSHA.

The exclusion of "supervisory personnel" from the definition of "miner" in section 48.2(a)(1)(ii) has a plain meaning apparent

from any reasonable reading of the regulation. The term "supervisory personnel" means individuals who are supervisors. Supervisors are persons having authority delegated by an employer to supervise others. Webster's Third New International Dictionary (Unabridged) 2296 (1986 ed.). Nothing in the regulation expressly suggests that the Secretary intended the term "supervisory personnel" to mean anything other than those persons who have been certified under an MSHA approved state plan and have been accorded supervisory status by their employers. Nothing in the regulation implies that "supervisory personnel" are vested with or divested of that status by virtue of the particular task they perform at any given moment. Nothing in the regulation hints that supervisory status is functionally distinctive, and that it contemplates a distinction between those supervisory personnel attending to supervisory tasks and those attending to production tasks.

It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "are to be given their usual, natural, plain, ordinary, and commonly understood meaning." *Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932). When the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning. *Old Dominion R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932); see *Emery Mining Corp. v. Secretary of Labor*, 783 F.2d 155, 159 (10th Cir. 1986). Thus, if an operator delegates to a miner authority to supervise, the

~284

miner is supervisory personnel." If he is also subject to MSHA approved State certification, then by the terms of section 48.2(a)(1)(ii) he is excluded from the training requirements of sections 48.3 through 48.10, including the task training requirements of section 48.7.

Despite the plain meaning of the regulation, the Secretary argues that her interpretation of the supervisory personnel exception to the definition of "miner" is reasonable and must be accorded deference. We have carefully considered the Secretary's arguments in this regard but find no basis upon which we may give weight to the Secretary's arguments in this case.

While the Secretary's interpretations of her regulations are entitled to weight, that deference is not limitless and the Secretary's interpretations are not without bounds. Deference is not required when the Secretary's interpretations are plainly erroneous or inconsistent with the regulation. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)(quoting *Bowles v. Seminole*

Rock Co., 325 U.S. 410, 413-14 (1945)). Nor does it weigh in the Secretary's favor when the Secretary has not offered reasonable interpretations of the standards. See Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134, 1145 (D.C. Cir. 1987). The Mine Act does not contemplate that the Commission merely "rubber stamp" the Secretary's interpretations without evaluating the reasonableness of those interpretations and their fidelity to the words of the regulations.

The language of the supervisory personnel exception is unambiguous. It exempts supervisory personnel subject to MSHA approved State certification requirements. Further, the Secretary's contemporaneous construction of her training regulations indicates no intent to distinguish between those supervisory personnel engaging in supervisory tasks and those attending to production tasks. In a preamble titled "Supplemental Information," published during promulgation of the final training regulations, the Secretary specifically stated that "supervisory personnel subject to an approved State certification program" would be excluded from Part 48 training requirements and that MSHA approved state certified training of supervisors was an "alternative to the training requirements" of Part 48:

Training of Supervisors. The final rule retains the exclusion from these training requirements of supervisory personnel subject to an approved State certification program. Some commenters were not aware of State certification requirements of supervisory personnel. Presently, certification programs are generally administered by coal producing states and are used by operators when complying with the training requirement for certified personnel found in §§ 75.160, 75.160.1, 77.107 and 77.107.1, Title 30, Code of Federal Regulations. MSHA will approve or evaluate the State certification programs to assure that such

~285

programs provide sufficient training as an alternative to the training requirements of subparts A and B; no formal approval process is contemplated. Commenters questioned why only those supervisors certified by approved State programs should be exempt from the training requirements. State certification programs are administered according to specific criteria, which helps insure that supervisors will receive adequate training.

43 Fed Reg. 47454, 47458 (October 13, 1978) (emphasis added). This preamble to the final rule represents the Secretary's contemporaneous interpretation of the exemption and contains nothing to suggest that "supervisory personnel" fall within or without it depending upon the nature of a task they momentarily undertake. To the contrary, the Secretary's commentary suggests that Part 48 training (which would include task training) for "supervisory personnel" was to be accomplished pursuant to approved State certification programs. In sum, what the Secretary now states she intended the words "supervisory personnel" to mean was not expressed in the training regulations during promulgation. The Secretary also points to several MSHA policy statements, issued subsequent to promulgation of the training regulation, enunciating her view of the limited nature of the supervisory personnel exception. These include a document entitled Q-A Memorandum (February 24, 1982) addressed to district managers, sub-district managers and field office supervisors and stating that "a state certified supervisor performing the work of a miner would be required to be trained under Part 48" (Exh. G-6); a 1984 MSHA Policy Memorandum stating that the supervisory personnel "exception applies only to the extent that supervisory work is being performed" (Exh. G-7); ^{9/} and a portion of the 1985 MSHA Administrative Manual stating that "if a supervisor operates mining equipment, or performs extraction, production and maintenance work, that supervisor is a 'miner' when performing this work and must have been given task training under section 48.7." Exh. G-8. While the Commission has recognized that there may be situations where MSHA policy memorandums, manuals or similar MSHA documents may "reflect a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in [the Commission] according it legal effect," it has declined to do so where the

^{9/} The 1984 MSHA Policy Memorandum also states: When supervisors perform or are expected to perform mining tasks, they are "miners" under Part 48 and must receive the required training. For example, if a supervisor operate mining equipment ... that supervisor must have completed task training as specified by [section] 48.7.... Exh. G-7 at sheet 2.

~286

interpretation or policy statement is inconsistent with the language of the standard. King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). See also United States Steel Corp., 5 FMSHRC 3, 6 (January 1983). In those instances, the Commission has concluded that "the express language of a ... regulation 'unquestionably

controls.'" King Knob, 3 FMSHRC at 1420. Here, where the Secretary's interpretation, as expressed in policy statements, flies in the face of the language of the rule itself, it is owed no deference. See also *Daviess County Hosp. v. Bowen*, 811 F.2d 338, 345 (7th Cir. 1987); *Union of Concerned Scientists v. Nuclear Reg. Com'n*, 711 F.2d 370, 381 (D.C. Cir. 1983). 10/

Thus, we do not view the commentaries on the supervisory personnel exclusion contained in the MSHA memoranda and manual as genuine interpretations or general policy statements; rather, they are an invalid attempt to amend the regulation to require the training of supervisory personnel on the basis of functional distinctions, a requirement not found in the adopted training regulations. 11/ As such, they represent a substantive modification of section 48.2(a)(1)(ii), not merely an interpretative gloss. Section 101(a) of the Mine Act, 30 U.S.C. § 811(a), requires all rules concerning mandatory health or safety standards to be promulgated in accordance with section 553 of the Administrative Procedure Act

10/ The present situation is in stark contrast to that involved in *Secretary on behalf of Bushnell v. Cannelton Industries, Inc.*, No. 88-1229, F.2d (D.C. Cir. February 14, 1989), where the court concluded that the Commission failed to extend due deference to the Secretary's interpretation of her regulation. In *Bushnell*, the Court noted that there was no "plain meaning" manifest on the face of the regulation; that the Secretary's interpretation was a reasonable one consistent with the language of the regulation; and that the preamble to the final rule strongly supported the Secretary's reading. Slip op. 14-15. We find that all of these factors are not present here.

11/ The Secretary argues that an industry representative on the advisory committee appointed by the Secretary to assist her in the development of the training regulations accepted MSHA's position that Part 48 training would be required for supervisors performing nonsupervisory work. S. Br. 8. We do not find this argument to be persuasive. To give weight to the unpublished remarks of one advisory committee member is entirely unwarranted in view of the unambiguous language in the regulation and the Secretary's statement during promulgation of the final rule that State certification programs for supervisory personnel are "an alternative to the training requirements of Subparts A and B [of Part 48]." 43 Fed. Reg. at 47454. See generally *Monterey Coal Co. v. FMSHRC*, 743 F.2d 589, 595-596 (7th Cir. 1984). Administrative history, like legislative history, cannot be used to create doubt where the language of the regulation is plain on its face. See *United States v. Oreson*,

366 U.S. 643, 648 (1961); *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 430 (4th Cir. 1981).

~287

("APA"). 5 U.S.C. § 553. Further, section 101(a)(2) of the Act, 30 U.S.C. § 811(a)(2), requires the Secretary to publish in the Federal Register any "proposed rule promulgating, modifying, or revoking a mandatory health or safety standard" and to permit public comment on the proposed regulation (emphasis added). Section 553 of the APA requires that to the extent a rule is more than an interpretation or general statement of policy, it is subject to the APA's notice and comment requirements. Because the Secretary's commentaries attempt to modify section 48.2(a)(1)(ii) and were not promulgated in accordance with applicable requirements, they lack the force and effect of law and section 48.2(a)(1)(ii) must stand as written. See *King Knob*, 3 FMSHRC at 1420-21. Finally, a regulation subjecting an operator to enforcement action under the Mine Act must give fair notice to the operator of what is required or prohibited and "cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). Here, we conclude that the plain language of 30 C.F.R. § 48.2(a)(1)(ii) did not notify Western Fuels of the functional distinction proffered by the Secretary in this proceeding -- that supervisory personnel subject to MSHA approved state certification must be task trained pursuant to section 48.7 if they engage in what MSHA regards as non-supervisory, production activities. In sum, we hold that section 48.2(a)(1)(ii) means what it says and that supervisory personnel subject to MSHA approved State certification are excluded from the mandatory training regulations of sections 48.3 through 48.10. Since Julius was a supervisor certified by the State of Colorado, an MSHA approved state program, we conclude that he was not required to be task trained on the Lee Norse roof bolting machine prior to operating it, and that the order and citation cannot be upheld.

~288

Accordingly, we reverse the decision of the judge and vacate the order, the citation, and the penalty assessment.

Ford B. Ford, Chairman
Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
James A. Lastowka, Commissioner
L. Clair Nelson, Commissioner
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